

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO. 34250/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
DATE: 21/09/2022

ADVOCATE S SAYED NO
CURATOR AD ITEM FOR F.G.W F[....] PLAINTIFF

AND

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

MAKHOB AJ

INTRODUCTION

1. Advocate Sayed claims in her representative capacity as duly appointed *curatrix ad litem* for F[....] G[....] W[....] F[....](hereinafter referred to as "the Minor child") who was 5 years 10 month when he was injured in a motor vehicle accident on 7 February 2017. On the 8th April 2022, the minor turned eleven years old.

2. No oral evidence was led by both parties. Counsel for the plaintiff and the defendant filed their heads of argument and addressed the court. The defendant did not dispute the plaintiffs medical reports. The merits have been conceded by the defendant.

3. The plaintiffs claim is as follows:

3.1. Future medical expenses undertaking in terms of section 17(4)(a)

3.2. General damages in the amount R 1 500 000.00 (one million five hundred thousand rands)

3.3. Loss of future income R 8 000 000.00 (eight million rands)

4. Counsel for the defendant submitted that the plastic surgeon has qualified the injuries sustained by the minor under narrative 5.2 due to the scarring on his back and she suggested the amount of **R 350 000.00** (three hundred and fifty thousand rand) together with a section 17(4) undertaking for future medical expenses.

5. In her concluding submissions, counsel for the defendant suggests an amount of **R 350 000.00** (three hundred and fifty thousand) towards general damages and an amount of **R 2 278 337.00** towards loss of earnings as fair and reasonable. Alternatively, loss of earnings to be postponed to when the injured is older. _She further contends that the loss has not yet materialised due to the young age of the injured. She further submits that should the court agree that the loss of earnings be postponed until such time that the injured is older and proper reassessment can take place. The defendant tenders an interim payment of R500 000 towards loss of earnings.

6. Dr T.P. Moja (specialist neurosurgeon) describes the minor's injuries as follows:

6.1. Bruising on the face

6.2. Dep abrasions on his back

6.3. 3rd degree burns on his back from a tyre rubbing against his back

6.4. Soft tissue right hip injury

7. The treatment was as follows:

7.1. He remained fully conscious with a Glasgow coma scale 15/15.

7.2. He was admitted for three days

7.3. He attended the local clinic for wound dressing

8. The doctor remarks that the minor is currently in Grade 3. He has made progress without repeating a Grade.¹ In conclusion the neurosurgeon says he has reached maximum medical improvement.

9. The issue in this matter is whether after hearing both counsel and having read the papers this court should grant the amount prayed for in the pleadings.

10. In *Road Accident Fund v Marunga*² the court said that there was no hard and fast rule of general application requiring the court or a court of appeal to consider past awards. The court further said that awards on decided cases might be of some use and guidance. In *Sandler v Wholesale Coal supplier Ltd*³ the court held that the amount to be awarded as compensation and the figure arrived at depends on the Judge's view of what is fair in all circumstances.

11. In my view the cases the court is referred to by counsel for the plaintiff are not identical to the matter before this court. In the matter before me the major injury sustained by the minor is the third degree burn on his back.

12. There are no broken bones sustained by the minor or serious head injuries. In my view taking into account all the medical reports the award of R300 000 (three hundred thousand) for general damages is reasonable under the

¹ Vide Caselines 009-13.

² 2003 (S) SA 164 (SCA)

³ 1941 AD

circumstances.

13. To determine whether there was any loss of earnings the court had first to determine whether the plaintiff had sustained any injury and, if so, the extent of such injury. It is not sufficient to place actuarial calculations before court and ask the court to determine the loss of earning without any reference to the merits of the matter.

14. The *locus classicus* with regard to contingencies is the judgment of Nicholas JA at 116-117 of the decision in *Southern Insurance Association v Bailey*,⁴ the court said "Where the method of actuarial calculations is adopted, it does not mean that the trial Judge is "tied" down by inexorable actuarial calculations. He has a large discretion to award what he considers right". Zulman JA, with reference to various authorities including Southern Assurance decision, said the following in *Road Accident Fund v Guedes* (611/04) [2006] ZASCA, [2006] SCA (RSA)

"The calculation of the quantum of a future amount, such as loss of earning capacity, is not as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, *southern insurance Association Ltd v Bailey* NO) court have adopted the approach that, in order to assist in such calculation, an actuarial computation is a useful basis for establishing the quantum of damages." Furthermore, in *Rudman v Road Accident Fund* ⁵the court held that where a person's earning capacity was compromised that incapacity constituted a loss if such loss diminished his estate and he is entitled to be compensated to the extent that his patrimony was diminished.

15. In *De Jongh v Du Pisane*⁶ the supreme court of appeal reiterated that contingency factors cannot be determined with mathematical precision and that contingency deductions are discretionary.

⁴ 1984 (1) SA 98 (A).

⁵ 2003 (2) SA 234 (SCA)

16. I am called upon to perform a delicate judicial duty in that I must determine the minor's future income, if any, having regard that there are no physical visible disabilities.

17. I am unable to find on the evidence before me that the applicant is entitled to any amount in respect of loss of earnings for the following reasons:

17.1. At the time he sustained injuries he was five years and ten months old.

17.2. He is currently attending school and is progressing very well.

17.3. He never repeated a grade

17.4. There is no indication that he will undergo a major operation in future.

17.5. There are no follow-up consultations with all the experts who examined him.

17.6. He has reached maximum improvement

18. In my view it will be premature to award damages in respect of loss of earnings since the minor is still making good progress at this stage and it is difficult to predict his future potential in earning a living.

19. In the premises, the following order is made:

ORDER:

1. The defendant is liable for 100% of the plaintiffs proven or agreed damages.

2. The defendant shall furnish a section 17(4)(a) undertaking in terms of the Road Accident Act.

3. The defendant shall pay to the plaintiff the sum of R350 000 (three hundred and fifty thousand rand only) in respect of general damages.

⁶ 2004 (5) QOD J2-103 (SCA).

4. The loss of earnings is postponed until such time that the injured minor is older and proper re-assessment can take place.

5. Cost of suit.

Date heard: 19 July 2022

Date of Judgment: 21 September 2022

**D.MAKHOB A JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the plaintiff: Advocate J Barn

Instructed by: Ehlers Attorneys

For the defendant: Advocate E Van Zyl

Instructed by: The State Attorney